LIM KIT SIANG

v.

DATO' SERI DR. MAHATHIR MOHAMAD

HIGH COURT MALAYA, KUALA LUMPUR
HARUN HASHIM J
[ORIGINATING MOTION NO. A32-103-86]
3 DECEMBER 1986

CIVIL PROCEDURE: *Contempt of Court - Application for leave for an order of committal for contempt of Court - Rules of the High Court 1980 - Order 52 - Power of High Court to punish for contempt of itself - Federal Constitution - Article 126 - Courts of Judicature Act 1964 - Section 13(2) - Words uttered by respondent - Whether they bring the judiciary into disrespect, disrepute, offend its dignity and are an affront to its majesty - Freedom of speech - Fair criticism - Whether the statement ex facie amounts to contempt of Court.*

This is an application under O. 52 of the Rules of the High Court 1980 for leave for an order of committal for contempt of Court allegedly committed otherwise than in connection with any proceedings. The power of the High Court to punish for contempt of itself is contained in Article 126 of the Federal Constitution and s. 13(2) of the Courts of Judicature Act 1964.

The respondent (currently the Prime Minister) gave an interview to the international editor and the Bangkok bureau chief of TIME magazine at parliament house in Kuala Lumpur. Excerpts of the interview under the heading "I know how the people feel" were published in the 24 November 1986 issue of TIME magazine and contains the followings passage at p. 18:

> **On the Courts**. The judiciary says (to us), 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our own interpretation.' If we disagree, the Courts will say, 'We will interpret your disagreement'. If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a Court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.

The applicant contended that this statement by the respondent had scandalised the Judiciary in this country in that read as a whole the words uttered by the respondent referred to hereinbefore bring the judiciary into disrespect, disrepute, offend its dignity and are an affront to its majesty. He contended further that the words "If we disagree, the Courts will say, 'We will interpret your disagreement'" are insulting, cynical, uttered with tongue in cheek and intended to ridicule the Judiciary as a whole. According to the applicant the said words were uttered by the respondent to needlessly embarrass the judiciary and amounted to a challenge to the authority of the judiciary and the doctrine of separation of powers guaranteed by the Federal Constitution. The applicant went on to say that the said words amounted to threatening and intimidating the Judiciary.

At this stage of the proceedings, the Court needed only to decide whether the statement *ex facie* amounts to contempt of Court.

Held:

[1] The right of every individual (including the Prime Minister) to freedom of speech in this country has been consistently upheld by the Courts subject only to any restrictions that are prescribed by the Constitution itself. There is no reason to deny that right to the respondent in the instant case.

[2] The Court should not be over-sensitive to criticism. The impugned statement, read objectively, is not even a criticism of the Court far less scandalising it or a threat to the independence of the judiciary. In essence it is the despair of a Prime Minister on the inadequacies of the law and more particularly the officials whose duties are to translate into law the policies and aims of the administration to ensure a more effective government.

[3] However comprehensive laws might be there is still no 100% guarantee that the Government will win its cases in Court all the time. If that were so, the public will lose confidence in the judiciary altogether. Apart from the law, the decision in a case much depends on the facts and it is in this area that improper or poor enforcement of the law by the Executive and its agencies which results in failure of government cases in the Courts.

[4] Taking into account fair criticism, free speech and the maintenance of the dignity and authority of the Courts as propositioned in the cases referred to in this judgment and an objective evaluation of the impugned statement, the learned Judge was of the view that the respondent's statement *ex facie* does not amount to a contempt of Court.

[Application dismissed.]

Cases referred to:

Surendra v. Nabakrishna [1958] AIR Orissa 168
The King v. Dunbabin & Anor. [1935] 53 CLR 434
Regina v. Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2) [1968] 2 QB 150

Legislation referred to:

Courts of Judicature Act 1964, s. 13(2)
Federal Constitution, art. 126
Rules of the High Court 1980, O. 52

For the applicant - Karpal Singh (Oh Choong Ghee with him); M/s. Karpal Singh & Co.

JUDGMENT

Harun J:

This is an application under RHC O. 52 for leave for an order of committal for contempt of Court allegedly committed otherwise than in connection with any proceedings.

The power of the High Court to punish for contempt of itself is contained in

(a) Article 126 of the Federal Constitution which reads -

> The Supreme Court or a High Court shall have power to punish any contempt of itself.; and

(b) Section 13(2) of the Courts of Judicature Act 1964 which reads-

> The High Court shall have power to punish any contempt of itself.

The respondent (currently the Prime Minister) gave an interview to the international editor and the Bangkok bureau chief of TIME magazine at parliament house in Kuala Lumpur. Excerpts of the interview under the heading "I know how the people feel" were published in the 24 November 1986 issue of TIME magazine and contains the following passage at p. 18:

> **On the Courts**. The Judiciary says (to us), 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the Courts will say, 'We will interpret your disagreement'. If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a Court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.

The applicant says that this "statement by the respondent has scandalised the judiciary in this country in that read as a whole the words uttered by the respondent referred to hereinbefore bring the judiciary into disrespect, disrepute, offend its dignity and are an affront to its majesty. The words, "If we disagree, the Courts will say, 'We will interpret your disagreement.'" are insulting, cynical, uttered with tongue in cheek and intended to ridicule the judiciary as a whole. The said words were uttered by the respondent to needlessly embarrass the judiciary. The said words also amount to a challenge to the authority of the judiciary and the doctrine of separation of powers guaranteed by the Federal Constitution. The said words amount to threatening and intimidating the judiciary."

At this stage of the proceedings, I need only decide whether the statement *ex facie* amounts to contempt of Court.

In support of his argument that the statement is a contempt of Court, Mr. Karpal Singh referred to

(a) *Surendra v. Nabakrishna* [1958] AIR Orissa 168 where it was held:

> The maintenance of the prestige and dignity of the High Court is the concern of every citizen of India and is safeguarded by some of the important provisions of the Constitution such as Article 211 and 215. It is also the special concern of a member of Parliament who, by the oath taken by him while sitting as a member, undertakes to bear true faith and allegiance to the Constitution. If therefore a Member of Parliament feels that a member of the state legislature has misused the right of freedom of speech conferred on him by the Constitution and that his speech has a tendency to impair the dignity and prestige of the High Court, then it cannot be said that he is not entitled to bring to the notice of the High Court the objectionable passage, for such action as the High Court may desire to take. Thus, an objectionable speech made on the floor of a legislature can be brought to the notice of the High Court by a private party.
>
> Any act done or writing published calculated to bring a Court or the Judge of a Court into contempt or to lower his authority is contempt of Court. A statement by the chief minister of a state to the effect that "in many instances the immaturity of the High Court is apparent", contains an aspersion regarding the competency of the Judges of the High Court. His remarks that "in many instances the judgments of the High Court were corrected by the Supreme Court" and that "in many instances" the "Supreme Court held that the High Court has abused (apabyabahara) the powers given to it" tend to lower the authority of the High Court a considerable extent and bring the Judges into contempt. The use of the expression 'apabyabahara' conveys the idea that the High Court has abused its powers, and is indeed objectionable and contains an imputation to the effect that the powers were used improperly.

And at p. 169:

> In cases of contempt, it is not the intention of the alleged contemner but the effect of undermining or lowering the Court in the estimation of the public or its tendency or likelihood to so undermine or lower the Court is the real test.
>
> The punishment for contempt is inflicted not for the purpose of protecting either the Court as a whole or the individual judges of the Court from a repetition of the attack but for protecting the public and specially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the Tribunal is undermined or impaired. Nothing is more incumbent on the Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public.
>
> The Courts, however, are not too sensitive or touchy in this respect. The dignity of the Court is not so frail as to be easily affected by casual remarks or comments.

In that case a survey was held by the High Court to be illegal. The state appealed to the Supreme Court. Before the appeal was heard, the chief minister of Orissa (Nabakrishna) moved a bill in the state legislature to validate the survey. In the course of his speech, the chief minister said:

> At present our Constitution is new, the High Court is new. In many instances, the immaturity of the High Court is apparent. In many instances the decision given by the High Court has been corrected by the Supreme Court. The Supreme Court also held that in many instances the High Court has abused the powers given to it.

The Court held that the chief minister's speech amounted to contempt of Court but that as it was made in the legislature, he was entitled to claim immunity from the jurisdiction of the Court.

(b) *The King v. Dunbabin & Anor.* [1935] 53 CLR 434, a decision of the High Court of Australia arising out of an article in a newspaper which *inter alia* said (at p. 435)

> **Courts & cabinets** - Some time ago the assistant treasurer (Mr. Casey) complained of the manner in which the High Court knocked holes in the Federal laws. Those laws have certainly been perforated by the keen legal intelligences of the High Court bench. One of the results of this game (a very expensive game for the taxpayers) is that the law which was relied upon to keep Australia white is in a state of suspended animation.

And at p. 436:

> When the amendments are made we should invite him to jump ashore again to see whether the new Act pleases the High Court any better than the old, or whether the ingenuity of five bewigged heads cannot discover another flaw. Upon another and more recent occasion, though it was declared by the representative of the party which passed an Act that his intention was to include secondhand dealers in the provisions of the sales tax, the High Court, with that keen microscopic vision for splits in hairs which is the admiration of all laymen, discovered that they were not included, and that a tax had been illegally collected for over four years. Well may the Caseys and the Kellys cry, like the historic British monarch, for some gallant champion to rid them of this pestilent Court.

In the course of his judgment Rich J said at p. 442:

> The jurisdiction (of the power of the Court to punish for contempt of itself) "is not given for the purpose of restricting honest criticism based on rational grounds of the manner in which the Court performs its functions. The law permits in respect of Courts, as of other institutions, the fullest discussions of their doings so long as that discussion is fairly

> conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained.

At p. 444 Rich J continued:

> I think the effect of the article, as well as its purpose, is to represent that the Court exercises its ingenuity in order to defeat legislation to which great public importance attaches and that the Federal Government encounters in the Court an obstacle it might well seek to remove. .... Such imputations, if permitted, could not but shake the confidence of litigants and the public in the decisions of the Court and weaken the spirit of obedience to the law.

The Court found the respondents guilty of contempt.

In the instant case, the statement of the respondent has to be read against the background of the doctrine of the separation of powers between the legislature, the executive and the judiciary. The function of the Legislature is to make laws. The function of the judiciary is to interpret the laws (made by Parliament) as it stands and not as the judiciary fancies it should be. There is a long list of decided cases on this point.

On analysis I find:

(a) "Although you passed a law with a certain thing in mind, we think your mind is wrong, and we want to give our interpretation"- is not a correct statement because the Court does not substitute the intention of the legislature with that of its own.

(b) "If we disagree, the Courts will say, 'we will interpret your disagreement.'" - It is not clear what is meant by this but in an adversarial system, the Court must decide in favour of one party against the other. The Court certainly does not interpret a disagreement. It either accepts or rejects an argument, giving reasons for its decisions.

(c) "If we go along, we are going to lose our power of legislation". If by "we" is meant the Executive, then it is obvious that under the Constitution, the Executive has no powers to legislate. But if by "we" is meant the power of the executive to introduce bills in Parliament, that power can never be taken away by the judiciary. The Courts do not initiate legislation, merely interprets it. It may well be that occasions may arise (and they have often done in the past not only in this country but in other countries as well) that a judgment of the Court triggers off new legislation because the legislature cannot be expected to foresee all the possibilities of the future.

(d) "We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way". - If the Court gives an interpretation different from that intended by the executive when it introduced the bill in Parliament, then the obvious conclusion is that the Parliamentary draftsman has not done a good job or misunderstood the intentions of the executive. The remedy is to amend the law and it is wrong to say "we have no means to reinterpret it our way" unless of course the law remains unchanged.

(e) "If we find out that a Court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish". - At least the respondent concedes that it is the function of the Court to interpret the law. The Court find no difficulty in determining the intention of the Legislature where the provisions contained

> in any act of Parliament are clear and unambiguous. Perhaps the time has arrived to design a new format for Acts of Parliament either by means of a comprehensive preamble to the Act declaring the intentions of the legislature or in an introductory part in the main body of the Act stating the objects and reasons for the Act, so that the intention of the Legislature is clear to all, including the judiciary. I do not, however, find in this part of the statement the sword of democles or the harbinger of a dictatorship.

In my view, the statement read as a whole is merely an expression of the respondent's dilemma and reflects some elements of confusion on the subject of the doctrine of the separation of powers.

Does the statement amount to a contempt of Court as illustrated by the Indian and Australian cases referred to by Mr Karpal Singh? It is important that the Courts should be the subjects of free criticism. It is equally important that the dignity and authority of the Court should be maintained. It is the reconciliation of these two principles that involves the difficulty in deciding cases of contempt of Court.

In *Regina v. Commissioner of Police of the Metropolis, Ex parte Blackburn* (No. 2) [1968] 2 QB 150 Lord Denning M.R. said at p. 154:

> This is the first case, so far as I know, where this Court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter.
>
> Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.
>
> It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a Court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to the criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct of our office, we cannot reply to the criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.
>
> Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right: nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

In that case, the Rt. Hon. Quintin Hogg QC, MP wrote an article which was published in the weekly periodical "Punch" which in part said:

> The recent judgment of the Court of Appeal is a strange example of the blindness which sometimes descends on the best of judges. The legislation of 1960 and thereafter has been rendered virtually unworkable by the unrealistic, contradictory and, in the leading case, erroneous, decisions of the Courts, including the Court of Appeal. So what do they do? Apologise for the expense and trouble they have put the police to? Not a bit of it. Lambaste the police for not enforcing the law which they themselves had rendered unworkable and which is now the subject of a Bill, the manifest purpose of which is to alter it. Pronounce an impending *dies irae* on a series of parties not before them, whose crime it has been to take

advantage of the weaknesses in the decisions of their own Court. Criticise the lawyers, who have advised their clients. Blame Parliament for passing Acts which they have interpreted so strangely. Everyone, it seems, is out of step, except the Courts ... The House of Lords overruled the Court Appeal ... it is to be hoped that the Courts will remember the golden rule for Judges in the matter of *obiter dicta.* Silence is always an option.

The Court held that despite inaccurate statements of fact in the article, the statement was not a contempt of Court but within the limits of free speech.

The right of every individual (including the Prime Minister) to freedom of speech in this country has been consistently upheld by the Courts subject only to any restrictions that are prescribed by the Constitution itself. There is no reason to deny that right to the respondent in the instant case. The Court should not be over-sensitive to criticism. The impugned statement, read objectively, is not even a criticism of the Court far less scandalising it or a threat to the independence of the Judiciary. In essence it is the despair of a Prime Minster on the inadequacies of the law and more particularly the officials whose duties are to translate into law the policies and aims of the administration to ensure a more effective government. But however comprehensive laws might be there is still no 100% guarantee that the Government will win its cases in Court all the time. If that were so, the public will lose confidence in the Judiciary altogether. Apart from the law, the decision in a case much depends on the facts and it is in this area that improper or poor enforcement of the law by the executive and its agencies which results in failure of government cases in the Courts.

Taking into account fair criticism, free speech and the maintenance of the dignity and authority of the Courts as propositioned in the cases referred to in this judgment and an objective evaluation of the impugned statement, I held that the respondent's statement *ex facie* does not amount to a contempt of Court and accordingly dismissed the application.

Also found at [1986] 2 CLJ 441